Crown liability Act

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Backgrounder

The Crown Liability Act: Has It Kept Up With the Times?

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THE CROWN LIABILITY ACT: HAS IT KEPT UP WITH THE TIMES?

INTRODUCTION

It is truism to say that governments today are engaged in a host of activities. We may readily conceive of occasions during the course of such activities when individuals might suffer damages, and allege that the federal government has been negligent and is legally liable, and accordingly might claim compensation by bringing an action against the government. Historically, however, it has not always been possible to do this. Under the British law that applies in Canada, the Crown traditionally enjoys immunity from claims "in tort", as it is expressed in common law, or "en responsabilité délictuelle" in civil law. For a long time, anyone who wanted to obtain compensation for damages caused by a prime minister, a minister or a public servant in the exercise of his or her duties had no choice but to bring action against the individual personally, the theory being that the individual who had caused the damage would pay for it out of his or her own pocket.

Crown immunity in this area could be changed only if Parliament intervened and legislated. The first federal statute which provided for a legal remedy against the Crown in tort was enacted in 1887.(1) The circumstances in which this remedy was available were, however, very limited, as we may see in the relevant passage of s. 16 of the Act of 1887, which defined the jurisdiction of the Exchequer Court (now the Federal Court):

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(1) Supreme and Exchequer Courts Act, S.C. 1887, c. 16.

> 16. The Exchequer court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> ...
>
> (c) every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;
>
> ...

Thus there were limits placed on this remedy with respect both to the nature of the damages suffered and to the place where they occurred. Parliament made an important change to this Act in 1938,(2) when the Exchequer Court was given jurisdiction to hear:

> Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

As a result of this amendment, such claims were no longer restricted to activities related to a public work.

The wording of the relevant legislation was changed considerably when the Crown Liability Act (the 1953 Act) was adopted in 1953; it is still the legislation on which liability of the federal Crown in tort is based.(3) The courts, which interpret the will of Parliament, have considered the application of this legislation to specific cases on enough occasions to make it clear that there are problems in interpreting it. Writers who have studied various aspects of the 1953 Act and the decisions of the courts relating to it have varying opinions on the nature of the problem. In some cases, the authors have blamed it on the attitude of the courts, and have urged these to give effect to the clear intent

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(2) An Act to amend the Exchequer Court Act, S.C. 1938, c. 28, s. 1.

(3) Crown Liability Act, S.C. 1952-53, c. 30; now R.S.C. 1970, c.C-38, in its amended form.

of Parliament as expressed in the Act.(4) On the other hand, some have bluntly expressed their wish to see the 1953 Act at the bottom of the Rideau Canal,(5) arguing that it does not provide any remedy where precedents indicate that such would be available against public authorities such as municipalities. A third group disputes the merit of basing, as is done at present, the liability in tort of the Crown or of any other public authority on the same principles as those of the law of torts applying to individuals. (6)

A thorough review of the questions raised by the 1953 Act would require consideration of which law was applicable (for example, is it the law that pertained in 1953, or the law at the time the damage was caused?), the conditions in which liability attaches, liability for the performance of certain duties, and the procedure to be followed in bringing an action in tort. The most important question is still the scope of government activities that can be the subject matter of an action under the 1953 Act, and it is this aspect that will be dealt with in this study. The Supreme Court of Canada has made a number of important decisions in cases of actions against municipalities. If we take the 1953 Act into consideration, do the principles stated in those cases apply to the federal Crown? In order to answer this question, we must first review the principles enunciated in the cases, and then consider them in the context of the 1953 Act.

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(4) See, for example, Grégoire Lehoux, "Les difficultés d'interprétation et d'application de la Loi sur la responsabilité de la Couronne ou les difficultés éprouvées par Sa Majesté à accéder au statut de personne majeure et capable", Revue générale de droit, Vol. 16, 1985, p. 29-48.

(5) Yves Ouellette, "La responsabilité extra-contractuelle de la Couronne fédérale et l'exercice des fonctions discrétionnaires", ibid., p. 67.

(6) David Cohen, J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law", Canadian Bar Review, Vol. 64, No. 1, March 1986, p. 1, and in particular section III, "The Inadequacy of the Common Law Principles", p. 24-29.

GOVERNMENT ACTIVITY AND LIABILITY IN TORT

A public authority, whether it be a municipality or the federal government, has a number of statutory functions. The form in which these functions are assigned to it by the legislative body may vary: there may be a duty to act, or there may be a discretionary power to act. In both cases, the public authority must, by definition, perform these duties and exercise these powers in the public interest, and not to promote a private interest. It is responsible to the public body that governs it for the proper performance of its functions. Thus, a municipal employee must answer for his acts to the municipal council; a public servant will answer to the government, which is itself responsible to Parliament. Ultimately, the electorate will judge the activities of public authorities. There have been many cases in which the courts have refused to grant redress because they believe that a minister is responsible to the Crown for the performance of a duty,(7) or to Parliament for the exercise of a power.(8) The duties and powers invested in public authorities are therefore distinguished primarily by their public nature. In other words, the context in which public authorities act is different from that in which individuals act. The essential question is, therefore, in what conditions do their activities which are subject to public law, also imply obligations under private law, which would then grant individuals the right to be compensated for damages incurred through the activities of public authorities.

A. Legislative and Quasi-Judicial Activities

In Welbridge Holdings Ltd. v. Corporation of Greater Winnipeg,(9) the Supreme Court of Canada dismissed an action in tort, distinguishing between the legislative and quasi-judicial activities of a municipality, and what it called its business (or "operational") powers.

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(7) Webster Industries Ltd. v. The Queen et al. (1983), 141 D.L.R. (3d) 564 (F.C. (Trial Division)).

(8) McHugh v. The Queen (1900), 6 Ex.C.R. 374.

(9) [1971] S.C.R. 957.

The plaintiff was a real estate development company which had relied on a zoning by-law when committing significant amounts of money to a project which collapsed when the by-law in question was declared to be illegal and quashed because of a defect in its adoption procedure. The plaintiff claimed that when the municipality adopted the by-law it had the responsibility to make sure that the prescribed procedure was being followed. It also claimed that the municipality had a private law duty to do this, and that, since it had been negligent, it would have to compensate the plaintiff.

Before distinguishing between the various functions of a public authority, the Court made an interesting comment on the object of a legislative activity:

> A rezoning application merely invokes the defendant's legislative authority and does not bring the applicant in respect of his particular interest into any private nexus with the [municipality], whose concern is a public one in respect of the matter brought before it.(10)

The Court then stated its position on the distinction between the various functions of the defendant municipality and the consequences of its actions in tort:

> The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component ... and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities ... in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.
>
> ... A municipality, at what be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority,; a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view

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(10) Ibid., p. 967.

> of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.(11)

B. Public Services

In the 1980s the Supreme Court of Canada decided two cases concerning inspection services established by municipalities: one had to do with public roads and the other with buildings under construction.

In Barratt v. North Vancouver,(12) a cyclist was injured while travelling on a street in the municipality of North Vancouver, when the front wheel of his bicycle fell into a pothole. Section 513 of the Municipal Act(13) provided:

> 513. ...
> (2) The Council may
> (a) lay out, construct, maintain, and improve highways or any portion thereof;
> ...
> (d) clean, oil, and water highways, and provide lighting for highways, and do such other things as are necessary for the safe use and preservation of highways;
> (e) authorize the Engineer or other official at his discretion to temporarily close a highway or part thereof to traffic, during the time work is in progress.

Pursuant to this section, the municipality had instituted an inspection system which provided for each street to be inspected every two weeks. The street on which the accident occurred had been inspected the previous week. The evidence indicated that the pothole had developed after this last inspection. The trial judge concluded that the inspection system was well organized, but found the municipality liable; in his opinion the system was inadequate, since it had not led to discovery of the pothole in time for the necessary steps to be taken to prevent the accident. Martland J., speaking for the Supreme Court of Canada, rejected this view of the duty imposed on the municipality. In his opinion, under the

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(11) Ibid., p. 968-969.

(12) [1980] 2. S.C.R. 418.

(13) R.S.B.C. 1960, c. 2.

relevant legislation, the municipality had the power to maintain its streets, but no duty to do so. He found the effect on municipal liability to be as follows:

> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.(14)

In a 1984 decision, the majority of the Supreme Court held in City of Kamloops v. Neilson(15) that a municipality was liable for failing to enforce its building standards by-law. The majority held that once the municipality had made the policy decision to provide standards for the construction of buildings within its territory there was an operational duty to enforce the by-law; given this context, the municipality was liable in private law to the purchaser of a house whose foundations did not comply with the by-law in effect and which had deteriorated because of a defect in these foundations.

Although there were variations of opinion between the judges in the majority and the judges in the minority in this case, it must be noted that they agreed on the principles to be applied in determining whether a public authority incurs liability in private law in the exercise of its statutory powers and duties. The method set out by the majority for making this determination requires that two questions be answered:

> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negate or limit (a) the scope of the duty and (b) the

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(14) Barratt v. North Vancouver, [1980] 2 S.C.R. 418, at p. 428.

(15) [1984] 2 S.C.R. 2.

> class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?(16)

According to Wilson J., these questions must be answered by an examination of the governing legislation. On this point, the majority adopted the method proposed by the British House of Lords in Anns v. Merton London Borough Council(17) for categorizing legislation:

> (1) statutes conferring powers to interfere with the rights of individuals, in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;
>
> (2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

In City of Kamloops v. Neilson, the majority categorized the city's decisions respecting the enforcement of its construction by-law as being within the operational level, and found that the city of Kamloops had a duty to ensure that it did not cause damage in the performance of its obligation. Being aware of problems in the foundations of the house in question, the city had not demonstrated due diligence as it had not even examined the possibility of enforcing compliance with the by-law.

C. Conclusion

The three decisions of the Supreme Court of Canada considered here provide us with two basic principles for cases in which a public authority may be held liable in tort. The Supreme Court distinguished between legislative and quasi-judicial functions, on

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(16) Ibid., p. 10.

(17) [1978] A.C. 728; cited at p. 11 of the judgment of the Supreme Court of Canada.

the one hand, and on the other, functions of a business (or operational) nature. In the former case, private law of liability will not apply. A distinction was also made between the policy decision level and the operational level. Here again, at the policy decision level, private law of liability will not apply. It appears that the Supreme Court has attempted to draw distinctions so that public authorities will be subject to private law of liability only in situations similar to those that arise between individuals; that is, when there is a sufficiently close relationship between the parties. Moreover, the court held that even when such a situation does exist there must be a careful examination of the governing legislation to see whether the private law duty that would normally arise from such a relationship should be limited or rejected altogether.

We should now consider whether the principles we have reviewed here will apply when compensation is claimed from the federal government.

THE CROWN AND LIABILITY IN TORT

The legislation affecting Crown liability before the 1953 Act was adopted was cited in the introduction to this study. The reader's attention is drawn to the decisions of the Courts before the 1953 Act came into effect, which show that the principles in cases involving municipalities, which we have considered above, are not strangers to the question of federal Crown liability. We will therefore make a closer study of the 1953 Act.

A. Cases Decided prior to the 1953 Act

Cases decided before 1953 are remarkable for the consistency of the principles on which they were based.(18) Two decisions, however, are particularly enlightening.

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(18) For a list of the decisions consulted in preparing this study, see the Bibliography.

In Harris v. The King,(19) the plaintiff's husband had been struck by a train at a level crossing in a city. The plaintiff brought action against the Crown, claiming, inter alia, that its agents had been negligent in failing to place a watchman or gates at the crossing in question. The Court rejected this claim:

> There is always some danger at every crossing, but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection.(20)

This lengthy passage from Harris v. The King indicates that, at the turn of the century, the courts, implicitly but clearly, were using the distinction between a policy decision and the carrying out of that decision in determining the liability of the Crown in tort.

As well, a majority decision of the Supreme Court of Canada in 1946 in The King v. Anthony(21) provides a clear illustration of another principle we have seen earlier: that an examination of the governing legislation may lead the court to limit or refuse to find any

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(19) (1904), 9 Ex. C.R. 206.

(20) Ibid., p. 209.

(21) [1946] S.C.R. 569.

private law duty in the performance of a particular activity. A soldier who was amusing himself by shooting in a barn caused a fire, in the course of which the barn and the animals in it were destroyed. The question before the Court was whether the superior of the soldier in question had a private law duty to the owner of the farm, and had been negligent in failing to prevent the soldier from engaging in the shooting. The majority of the Supreme Court of Canada answered in the negative. Rand J. disposed of the question as follows:

> In the national organization, military and police agencies are necessary for the preservation of the national life and its order. For this purpose, men must, among other things, be entrusted with instruments of danger, and laws, rules and authority are set up to regulate their behaviour. But the duties so arising are essentially for the public interest.(22)

He added:

> The military law is a body of rules by which, among other objects, the possibilities of illegal and injurious action, whether by means of dangerous weapons entrusted to soldiers or otherwise, may be restricted; but it is a proposition which I am unable to accept that persons bearing authority must have regard to private interests before they may safely abstain, in any situation, from exercising it ... . In this case, the sergeant's excuse was that he had to get on with the military movement in which he was engaged. It was in a time of war. Are the courts to sit in judgment on decisions of that sort in a conflict between public and private interests? ... Officers are accountable to military law for failing to exercise authority when exercise is called for; but the penalties prescribed by it for such delinquencies must, I think, be looked upon as the only sanctions intended, and the duties raised as not intended to enure to the private benefit of the citizen.(23)

To summarize, the sergeant, by acting as he did in the circumstances, had perhaps breached his public duty toward the Crown under military law, but military law prevented there being any private law duty to the owner of the barn.

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(22) Ibid., p. 573.

(23) Ibid., p. 574.

B. The 1953 Act

In 1953, as was noted above, the Crown Liability Act was enacted. This Act included a section dealing specifically with Crown liability for damages caused by a motor vehicle owned by it,(24) and with Crown liability attaching to the ownership, occupancy, possession or control of property.(25) However, the most interesting provision for the purposes of our study is paragraph 3(1)(a), a provision of general application concerning the liability of the Crown in tort:

> 3.(1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable (a) in respect of a tort committed by a servant of the Crown ...

This section must be read together with subs. 4(2) of the Act:

> No proceedings lie against the Crown by virtue of paragraph 3(1)(a) in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

In 1957,(26) the Supreme Court of Canada was interpreting these two provisions as the legislative expression of the principles that had guided it in the 1946 decision in The King v. Anthony. There was therefore no break between the 1953 Act and the earlier legislation. The result is that if the Crown is to be liable in tort it has to be shown that a Crown servant had a private law duty to the person who suffered damage, and that the governing legislation neither limited nor excluded such liability.

Arguments have been advanced to show that the 1953 Act itself contained, in respect of certain federal activities, limitations on the private law duty imposed on the Crown permitting actions in tort for damages suffered. The Crown made these arguments in a case recently heard

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(24) Subs. 3(2).

(25) Para. (3(1)(b).

(26) The Cleveland-Cliffs Steamship Company et al. v. The Queen, [1957] S.C.R. 810.

by the Federal Court of Appeal: Baird v. The Queen;[27] they were rejected by the Court. However, it should be noted that Baird v. The Queen was decided on a motion by the Crown for a declaration that the action should be dismissed because the plaintiff had failed to disclose a cause of action. The principles set out by the Court in making its decision on this motion do not provide a definitive decision on the law.

While a number of points of law were discussed in that case, two in particular are relevant to this discussion. First, it was argued that the Crown was not liable in tort when a public power was imposed or conferred directly on a servant of the Crown by the Act. Secondly, it was argued that a minister of the Crown is not a servant of the Crown. It will be recalled that the Court rejected these arguments. The reasons for judgment, however, provide little detail, although a careful study of them and the cases cited confirms that the decision at which the Federal Court of Appeal arrived was correct.

In support of the first point, it was first noted that paragraph 3(1)(a) of the 1953 Act, by using the expression "if [the Crown] were a private person of full age and capacity", limited the cases in which the Crown could be held liable to activities which resembled those of individuals. This argument is not sound for two reasons. First, the 1953 Act uses the same expression when, for example, it is dealing with damages caused by motor vehicles owned by the Crown. This is, in itself, a situation where an individual would be liable in tort. If the expression "if [the Crown] were a private person of full age and capacity" had to be given the meaning put forward in this argument, it would not be necessary to use it in the 1953 Act when it deals with situations like traffic accidents. Secondly, both the cases decided respecting Crown liability in tort dating from before 1953 and the recent decisions of the Supreme Court of Canada on municipal liability in tort have rejected the possibility of imposing a private law duty in respect of activities that have no counterpart among private individuals. It must be recalled that the courts always require that there be a close relationship with the authority that is vested with a public duty or power if there is to be a private law duty

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(27) [1984] 2 F.C. 160.

imposed on that authority. For example, in Welbridge Holdings Ltd. v. Corporation of Greater Winnipeg,(28) Laskin J. wrote that the exercise of a legislative power created no private relationship. If we apply the principles found in this decision and in Barratt v. North Vancouver(29) and City of Kamloops v. Neilson(30) we find no implication that the Crown would be found liable in tort in situations which had no counterpart in the private sector.

In this connection, it has also been argued that there can be no Crown liability in cases where the public duty or power was imposed or conferred directly by statute on a public servant; this argument is based on part of subs. 3(6) of the 1953 Act: "Nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of ... any power or authority conferred on the Crown by any statute".(31) This provision, which is clearly intended to limit Crown liability, must be interpreted in light of the principles that applied at the time the 1953 Act came into effect. Thus, in The King v. Anthony,(32) the Supreme Court of Canada distinguished between a situation where there was direct liability and one where there was liability for the actions of third parties: if the duty in question is imposed on the Crown itself, and the Crown gives an instruction to its servant to perform the duty and is negligent in doing so, the Crown is directly liable; if, on the other hand, it is the servant who is negligent in performing the instruction, the Crown is indirectly liable, that is, it is liable for the actions of a third party (the negligent Crown servant). Since the legislation in effect at the time required that it be shown that the servant had himself been negligent, the only possible situation where there would be no liability in tort would be if the Crown itself had been negligent. It will be recalled that the 1953 Act was considered to have

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(28) See footnote 9.

(29) See footnote 12.

(30) See footnote 15.

(31) The English version of this subsection is the clearer of the two versions.

(32) See footnote 21.

adopted the principles in The King v. Anthony. Thus it is surprising, at the least, to see that it was recently argued that the 1953 Act applied only to situations in which a public duty was imposed or power conferred directly on a Crown servant by statute.

In addition to these arguments on the legislation, there has also been reference to Australian cases, which, it was argued, held that an employer, specifically the Crown, is not liable for the tortious acts or omissions of its servant in the performance of an independent discretionary function or power imposed or conferred directly on the servant by statute, and not through the instructions of the employer.(33) Careful reading of the cases cited indicates that this was not at all what is meant in these decisions. Thus, for example, in Baume v. The Commonwealth,(34) the Australian High Court examined the public duties and powers that the Customs Act of 1901 imposed or conferred directly on the customs officer, a servant of the Australian Crown, who was alleged to have been negligent. Clearly the High Court found that the Crown was not liable for certain acts of its servant. It must be noted, however, that the Court applied the principle that it is the governing legislation that will determine whether a private law duty is limited or excluded in the exercise of public duties or powers. Thus, for example, it found in this case that certain powers were of a quasi-judicial nature.(35) It is therefore not surprising in these circumstances that it did not find the Crown liable in tort: this is not a situation where there existed a "close relationship". Here again, the decision corresponds to the judgment in Welbridge Holdings Ltd. v. Corporation of Greater Winnipeg.(36) That did not prevent the Australian

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(33) Summary of the argument by Le Dain J.: Baird v. The Queen, [1984], 2 F.C. 160, at p. 184; in support of this argument, the following decisions were cited: Darling Island Stevedoring and Lighterage Company Limited v. Long (1957), 97 C.L.R. 36 (H.C.); Enever v. The King (1906), 3 C.L.R. 969 (H.C.); Baume v. The Commonwealth (1906), 4 C.L.R. 97 (H.C.); Field v. Nott (1939), 62 C.L.R. 660 (H.C.).

(34) (1906), 4 C.L.R. 97 (H.C.).

(35) Ibid., p. 111.

(36) See footnote 9.

High Court from finding the Australian Crown liable for certain other public duties(37) and public powers(38) imposed or conferred directly on the servant by the Customs Act. As a result, no argument can be built on the basis of the Australian cases.

It remains for us to examine another important point discussed in Baird v. The Queen: whether a Minister of the Crown is a servant of the Crown for the purposes of the 1953 Act.

This question has often been addressed in the cases, particularly in actions in tort against the Crown brought before the 1953 Act came into effect. The legislation in effect at that time, it will be recalled, required the damages to have been caused by a servant of the Crown. The courts sought the answer by examining the governing legislation, in order to determine whether the public duties or powers of the minister in question were such as to give rise to an action in tort. In other words, the courts used the following principle: Parliament gave the courts jurisdiction to hear actions in tort for damages caused by servants of the Crown, but there are situations in which the governing legislation excludes all possibility of such actions; in those cases, it cannot be said that there were damages caused by a servant of the Crown, within the meaning of the legislation that conferred jurisdiction on the courts.

This point is clearly illustrated in The Hamburg American Packet Company v. The King.(39) In that case, it was alleged that the Minister of Public Works had been negligent in not keeping a channel open for navigation. After examining the governing legislation, the court held that in the circumstances the Minister was not a servant of the Crown:

> ... it does not follow that once the Minister has expended money for such a purpose [the dredging of a channel] the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages. It is argued that the section of The Public Works Act to which reference has been made, and the 9th section of

(37) Baume v. The Commonwealth (1906), 4 C.L.R. 97, at p. 115.

(38) Ibid., p. 124.

(39) (1901), 7 Ex. C.R. 150.

> the same Act, which provides that the Minister shall direct the construction, maintenance and repair of all harbours, roads or parts of roads, bridges, slides and other public works and buildings constructed or maintained at the expense of Canada, impose that duty and responsibility on the Minister, and that the Crown is liable for his failure to maintain any public work and to keep it in good repair. With that view I do not agree. I do not think it was the intention of Parliament in enacting The Public Works Act to impose any such obligation or responsibility on the Minister and through him on the Crown. There is an evident intention to provide that when any work of the kind was to be done, it should, in respect of the enumerated works, be done under the discretion of the Minister of Public Works; but I do not think there was any intention to make any such marked and striking departure from well understood rules and principles. The Public Works Act was passed long before The Exchequer Court Act, and it cannot be doubted that it was never intended by any provision occurring therein to subject the Minister in respect of his political action or his discretion, or the Crown's as to the expenditure of public money, to the jurisdiction of any court.(40)

Clearly the judge did not dismiss the action because the minister was not himself a servant of the Crown; clearly also the judge's answer might have been different if the governing legislation had required the minister to maintain the channel in question in good navigable condition. In fact, it is obvious that the existence of a "close relationship" will change the answer to the question.

The same sort of reasoning found in The Hamburg American Packet Company v. The King appears in McHugh v. The Queen,(41) Mavor v. The King,(42) and a number of other cases. The only decision in which the judge's method consisted of asking whether the minister himself could be considered to be a servant of the Crown is McArthur v. The King.(43) This case, however, dealt with a member of the military, and the judge

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(40) Ibid., p. 178.

(41) See footnote 8.

(42) (1919), 19 Ex.C.R. 304.

(43) [1943] Ex.C.R. 77.

dealt with the status of ministers of the Crown only in passing; his opinion on this point is therefore not an authoritative precedent. In that case, Thorson J. held that the minister was not a servant of the Crown, but rather an adviser to the Crown.(44) However, he based his decision on McHugh v. The Queen and Mavor v. The King, and that is clearly not the basis on which those decisions were made. As well, and it is important that this be noted, when the Exchequer Court some years later again had to decide a case concerning a minister it did not hold to the position that a minister was not himself a servant of the Crown; rather, it examined the governing legislation to see whether it gave the Court jurisdiction over the acts of the minister in question.(45)

Thus no obstacle arises from the status of minister in itself that would prevent a court from considering him or her a servant of the Crown within the meaning of the 1953 Act. Here again, it must be determined whether the act complained of is one for which the Crown may be liable under the Act. In order to make this determination, it must be asked whether there is a close relationship between, for example, the minister of the Crown and the person who has suffered damages, and whether there is in the governing legislation anything that would limit or exclude the imposition of a private law duty.

C. Conclusion

There is no unsurmountable obstacle, in either the 1953 Act itself or the cases on Crown liability before 1953, to a finding that the public duties or powers imposed or conferred on the federal government would give rise to liability in tort, as is the case for other public authorities. This would be true even of ministers. The only possible exclusion would be if the Crown itself were negligent.

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(44) Ibid., p. 97.

(45) Belleau v. Minister of National Health and Welfare, [1948] ExC.R. 288.

GENERAL CONCLUSION

Does the Crown Liability Act meet the needs of 1986 in the area of negligence in the performance of public duties or powers? On the basis of this study, it is clear that we may say it does. This, however, is far from saying that new action by Parliament on the subject would not be useful. It is significant, in fact, that in 1984 - more than 30 years after the 1953 Act was adopted - there are still urgent calls for the courts to give effect to the clear intent of Parliament.(46) Even if the courts were to hear these calls, they might take years to respond. Parliament can certainly intervene to hasten the process. At the same time, Parliament might also take into consideration the views of those who maintain that 1986 is not the appropriate time.(47)

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(46) See footnote 4.

(47) See footnote 6.

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